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IN THE

Supreme Court of the United States

October Term, 1982

No. _____

ROBERT A. SNOWDEN, JR.,
SAMUEL SYLVESTER SNOWDEN,
STEPHEN JAMES ISRAEL,
DOUGLAS F. TEMPLES,
HAROLD DEAN JACKSON,
LYNN H. JOHNSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

WHETHER THE GOVERNMENT SHOULD BE BARRED FROM REPROSECUTING PETITIONERS, WHERE THE FACTS AT TRIAL SHOW THAT THE PETITIONERS' MOTION FOR MISTRIAL WAS GRANTED AS A DIRECT RESULT OF THE PROSECUTION'S GROSS NEGLIGENCE AND LACK OF PREPARATION.

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Petitioners, ROBERT A. SNOWDEN, JR., SAMUEL SYLVESTER SNOWDEN, STEPHEN JAMES ISRAEL, DOUGLAS F. TEMPLES, HAROLD DEAN JACKSON and LYNN H. JOHNSON, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

JURISDICTION

The decision of the Court of Appeals was entered on September 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-3a) was unpublished.

STATEMENT OF THE CASE

On June 25, 1980, Petitioner ROBERT SNOWDEN was indicted on charges of (1) conspiracy to possess marijuana, (2) attempted bribery, and (3) importation of marijuana. All of the Petitioners were indicted on charges of (1) conspiracy to possess with intent to distribute marijuana, and (2) possession with intent to distribute marijuana.

On October 7, 1980, the government brought a superseding indictment charging Petitioners with conspiracy to possess with intent to distribute marijuana, possession with intent to distribute marijuana, and charging Robert Snowden, Jr. with attempted bribery.

On November 3, 1980, the case was called to trial and during the second day of trial, the Court granted the Petitioners' verbal motions for mistrial.

On December 29, 1980, the Petitioners filed a motion to dismiss the indictment based on statutory and constitutional deficiencies in the grand jury selection and impanelment process and on December 31, 1980, Petitioners filed a motion to dismiss the indictment on double jeopardy grounds and to bar retrial.

On January 5, 1981, United States District Court Judge William C. Keady consolidated Defendants' grand jury motion with others in the Northern District of Georgia and on March 17, 1981, Judge Keady granted devendants' motion to dismiss the indictment due to grand jury infirmities.

On August 3, 1981, the Petitioners were reindicted on charges of conspiracy to possess with intent to distribute marijuana and possession with intent to distribute marijuana. Robert Snowden, Jr. was also charged with attempted bribery.

On November 6, 1981, the trial court reviewed and denied Petitioners' motion to dismiss the indictment on double jeopardy grounds and to bar retrial, which stemmed from the mistrial granted November 4, 1980.

The trial court entered a written order denying Petitioners' motion and they took an interlocutory appeal to the Eleventh Circuit Court of Appeals which was denied.

This case first came to trial on September 8, 1980. Assistant United States Attorney (AUSA) Dorothy Kirkley was government counsel at that time. (V. 5:2-36) After the case was called, but before the jury was impaneled, defense counsel were given copies of the grand jury proceedings in the case. Upon review of these proceedings, defense counsel raised certain problems concerning possible grand jury abuse and government misconduct surrounding the return of the indictment. Defendant Johnson was not mentioned at all during the presentation of the case to the grand jury other than in the actual reading of the indictment, although a Mr. Harrison (Johnson's middle name) was mentioned. (V. 3:13). The trial was continued until the November term, in order to give defense counsel an opportunity to brief the grand jury abuse issues raised. (V. 5:2-3)

On October 6, 1980, AUSA Kirkley announced at an in-chamber's meeting with the district court judge and defense counsel present, that the government would re-

indict the case by bringing a superseding indictment and that AUSA Sutton would be handling the case. (V. 3:5) AUSA Kirkley also argued that the superseding indictment would render the grand jury abuse issues moot. (V. 3:3-5)

On October 7, 1980, the defendants were reindicted and on November 3, 1980, the case was again called to trial. The Petitioners argued for a severance of Count Three of the indictment which charged defendant Robert Snowden, Jr. with bribery (V. 7:3) and for a *James* hearing. (V. 7:17-18) The court ordered a severance of Count Three and ordered the government to reorder its proof so that before statements by alleged co-conspirator, Robert Snowden, Jr. were introduced, the court would be able to determine whether or not the statements would be admissible against other defendants by substantial independent evidence and whether or not there was evidence to indicate that they were members of a conspiracy. (V. 7:51)[1]

After ruling on these matters the jury was sworn (V. 7:650) and the government began its opening statement. (V. 7:73) During opening, AUSA Sutton stated:

> . . . with regard to Court Two of the indictment, it reads that the defendants aided, abetted and couseled by one another, did possess a quantity of *cocaine* with the intent to distribute. (V. 7:75) (Emphasis added)

An objection and motion for mistrial was made by defense counsel on the ground that the case had nothing whatsoever to do with cocaine. (V. 7:76) The court

[1] It should also be noted that during trial, there was often confusion by AUSA Sutton as to what AUSA Kirkley's position had been on discovery matters. (V. 7:58; V. 7:110; V. 7:131; V. 7:142; V. 8:348; V. 8:399; V. 8:525).

denied the motion for mistrial and gave a cautionary instruction:

> All right, ladies and gentlemen of the jury, the Assistant United States Attorney in his opening statement made an incorrect statement and I wish to caution you and admonish you to diregard the statement he had made just before you were sent out of the room. He made reference to Count Three of the indictment and what it alleged and he stated an incorrect substance . . . (V. 7:79)

Also during opening statements the court warned AUSA Sutton "to be cautious of anything [statements] that is covered by Miranda . . ." (V. 7:88) Two defense counsel gave opening statements, while others reserved the right to open. (V. 7:93-7)

The government began its case in chief. (V. 7:97) Several objections were made by defense counsel to co-conspirator hearsay on the basis that there had been no showing of a conspiracy by independent evidence and that each defendant was a member of the conspiracy. (V. 7:00; 7:162; 7:181) The court finally ruled:

> At this point, we will go ahead with the jury on the representation you [AUSA Sutton] are going back to the airport *and not to any conversation between the sheriff and Mr. Robert Snowden.* (V. 7:182) (Emphasis added)

Nevertheless, with the very next question, AUSA Sutton brought out objectionable co-conspirator hearsay (V. 7:186; 7:187) and the district judge made the decision that a *James* hearing would be necessary. (V. 7:192) A *James* hearing was conducted outside the jury's presence (V. 7:183-298); V. 8:299-624) At the close of the *James* hearing, the court found that under all the circumstances, there was a conspiracy and there was some substantial

evidence that each of the defendants was a participant in the conspiracy. (V. 8:624) The jury trial then continued. (V. 8:624)

One government witness, Sheriff Hartsel Moore, testified on direct examination as follows:

Q: Now, Sheriff, in that conversation, *you mentioned a DC-6 at the early part of the conversation.* What in that regard sir, were you making reference to?

A: Previous *we talked about a DC-6 that was at Ashe County, North Carolina.*

Q: And what, sir, *had Mr. Snowden asked you to do with regard to the DC-6?*

A: *Check on when it would be auctioned off, if there was any way I could help get it back.*

Q: All right, sir, did you do anything like that for Robert Snowden?

A: No, I did not. (V. 8:645-6) (Emphasis added)

Then, during the direct testimony of Case Agent John Landrum, the following occurred:

Q: Agent Landrum, before Government Exhibit No. 21, I believe was damaged—if you would, describe Government's Exhibit 20. Describe the nature of the damage to the exhibit, please.

A: The nature is that the tape jumped off of the track and got all fouled up, irreparably so.

It was being played at the time by AUSA Dorothy Kirkley to Sheriff Hartsel in my presence.

X X X

At any rate, it was played on Sunday afternoon *prior to the date that we were scheduled for trial on the last occasion.*

X X X

Q: When was Government Exhibit 27 made, before or after Government's Exhibit 20 was damaged?

A: *It was made before, just prior to grand jury indictment on the first indictment.* (V. 8:649) (Emphasis added)

At this time, Petitioner Temple's counsel made a motion for mistrial on the ground that the reference to a "prior indictment" and "other trial date" inferred other misconduct by Petitioners. (V. 8:657)

Petitioner Snowden's counsel also made a motion for mistrial based on Sheriff Moore's testimony concerning the confiscated DC-6, which Mr. Snowden wanted to get back. He argued that this, too, directed itself to the existence of a prior crime. (V. 8:652)

Counsel also argued that the statement about the repurchase of the DC-6 and the statement about the prior indictment, coupled together, were the basis for mistrial. (V. 8:653) All Petitioner's joined in this motion. (V. 8:653)

The court ruled:

> The DC-6 would not cause me any [concern]. I listened to it and it did not cause me any great concern. To me, I got the reaction they were trying to buy an airplane and these people were not connected with it but then with the first indictment reference, it could easily be connected up suggesting that Mr. Snowden was the one involved in a previous indictment involving a DC-6.
>
> There was no excuse for the reference to a first indictment or a prior trial, either one. I am going to grant the motion. I think it was error. I think it was innocent error and innocent mistake but it should not have been done. I am going to grant the motion.
>
> *All right, maybe the government can get their act*

> *together a little better*. We are probably going to retry this case starting immediately after Christmas . . . (Emphasis added)

This case was rescheduled to be tried on January 5, 1981. However, on December 29, 1980, the defendants filed a motion to dismiss the indictment based on statutory and constitutional deficiencies in the grand jury selection and impanelment process. (V. 12:1017) Also filed was the defendants' motion to dismiss the indictment on double jeopardy grounds and to bar retrial. (V. 12:1025)

On August 4, 1981, defendants were again reindicted by a superseding indictment. (V. 12:1284) The defendants adopted all prior motions and the magistrate adopted all prior orders and denied the defendants' motion to bar retrial on the grounds of double jeopardy which had been filed on December 28, 1980.

In his report, recommendation and order, the magistrate found that the facts before him would not bar reprosecution of the defendants. As his ground for finding that reprosecution might occur without constitutional error, the magistrate cited the general rule that a mistrial on a defendant's own motion would not violate the double jeopardy clause, citing *United States v. Dinitz*, 424 U.S. 600, 607-608. The magistrate noted the "bad faith" exception to that general rule, but found that defendants allegations of actions constituting prosecutorial misconduct were insufficient to reach the level of bad faith, harassment or prejudice required to fall into the exception.

The Petitioners filed their objections to the magistrate's report, recommendation and order. Included was an objection to the magistrate's ruling on his "Motion to Dismiss the Indictment on Double Jeopardy Grounds and

to Bar Retrial". (V. 12:1326)

On Monday, November 2, 1981, the trial court held a hearing on the defendants' objection to the magistrate's report, recommendation and order. (V. 6) During oral argument, the defendants reviewed the incidents which led to their motion for a mistrial. (V. 6:14-24) Included in their argument was that AUSA Sutton was ill-prepared to try the case (V. 6:14-24); that he had to call the prosecutor who began the case to determine what her position had been on several matters (V. 6:14-24); that he mentioned "cocaine" in his opening statement when only crimes associated with marijuana were charged (V. 6:14-24); that an airplane in another case was mentioned by a witness (V. 6:14-24); and that Case Agent Landrum, improperly answered a question by disclosing the prior indictment and trial date in the case. (V. 6:14-24)

The trial judge denied defendants' motion to dismiss on the basis of double jeopardy (V. 6:38), but permitted the defendants to appeal his ruling to the Eleventh Circuit Court of Appeals. (V. 6:39) All defendants, except for defendant Mock, joined in the appeal, which was denied on September 21, 1982.

REASONS FOR GRANTING THE WRIT

This case presents a due process question of exceptional importance warranting review by this Court. The issue arises from the Court of Appeals' holding that the trial court did not err when it denied Petitioners' motion to dismiss the indictment on double jeopardy grounds and to bar retrial. The conclusion of the Eleventh Circuit is contrary to the established principles of the Fifth Amendment and due process clause. Where the facts at trial show that mistrial was granted as a direct result of the

prosecution's gross negligence, and lack of preparation, the government should not be permitted to retry Petitioners. The ban against double jeopardy must be scrutinized in light of government misconduct which, may not be intentional, but which is grossly negligent. No case in this Court has specifically addressed the question of what conduct would constitute gross negligence and thus, the issue raised here is one of first impression. This Court needs to set forth guidelines which will define that conduct which does rise to the level of gross negligence.

WHETHER THE GOVERNMENT SHOULD BE BARRED FROM REPROSECUTING PETITIONERS, WHERE THE FACTS AT TRIAL SHOW THAT THE PETITIONERS' MOTION FOR MISTRIAL WAS GRANTED AS A DIRECT RESULT OF THE PROSECUTION'S GROSS NEGLIGENCE AND LACK OF PREPARATION.

United States Constitution, Amendment V, provides in part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

This Court has explained that the double jeopardy clause protects two important interests of the criminal defendant: (1) the right to have guilt or innocence determined by the particular jury then impaneled, and (2) the right to be free from harassing multiple prosecutions for the same offense:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing

> state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> *Green v. United States*, 355 U.S. 184, 187-188 (1958).

In *Crist v. Bretz*, 437 U.S. 28 (1978), the Court set out the stage in a jury trial that jeopardy attaches:

> . . . The precise point at which jeopardy does attach in a jury trial might have been open to argument before this Court's decision in *Downum v. United States*, 372 U.S. 734 . . . The Court held that the Double Jeopardy Clause prevented a second prosecution of a defendant whose first trial had ended first after the jury had been sworn and before any testimony had been taken. The court necessarily pinpointed the stage in a jury trial that jeopardy attaches, and the *Downum* case has since been understood as explicit authority for the proposition that jeopardy attaches when the jury is empaneled and sworn . . . (at 689).

The applicable law which governs this petition is set out in *United States v. Dinitz*, 424 U.S. 600 (1976).

In *Dinitz*, the defendant was charged with conspiracy to distribute L.S.D. During the defense's opening statement, lead defense counsel was reprimanded by the judge for making what the judge considered impermissible remarks. After a number of reprimands, the judge barred lead defense counsel from continuing with the trial and directed him to leave the courthouse. When the assisting defense counsel informed the court that the defendant wanted lead counsel to try the case, the judge set forth three (3) alternatives: (1) a stay or recess pending application to the Court of Appeals to review the propriety of expelling counsel; (2) a continuation of the trial with assisting defense counsel; or (3) a declaration of mistrial

that would permit the defendant to obtain other counsel. The assisting defense counsel moved for mistrial. Following mistrial, defendant was retried on the same charge. His motion objecting to the retrial on double jeopardy grounds was denied, and he was convicted by a second jury. A divided Court of Appeals (8-7 en banc) subsequently held that the reprosecution was barred by double jeopardy. The court concluded that the request for a mistrial had not constituted a waiver and that the manifest necessity standard applied. Thus, the discharge of counsel, which gave rise to the mistrial, was not justified by manifest necessity in light of the other alternatives available to the trial judge.

This Court reversed the Court of Appeals and reasoned that the defendant, when moving for mistrial, generally faces a "Hobson's choice" between giving up his first jury and continuing a trial tainted by prejudicial, judicial or prosecutorial error. The Court stated that the important consideration for purposes of the Double Jeopardy Clause is that the defendant retains primary control over the course to be followed in the event of such error. Since the defendant in *Dinitz* retained primary control, the court held that the Court of Appeals erred in finding that the retrial violated the defendant's constitutional right not to be twice put in jeopardy.

The Court did set out when double jeopardy does attach:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. *It bars retrials where 'bad-faith conduct by judge or prosecutor'* [cite omitted] *threatens the 'harassment of an accused by successive prosecutions*

or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. 47 L.Ed.2d at 276. (Emphasis added)

The Fifth Circuit Court of Appeals has consistently interpreted the "bad faith" standard as requiring a finding of gross negligence or intentional misconduct on the part of the Government which has seriously prejudiced the defendant. *United States v. Gaultney*, 606 F.2d 540, 547 (5th Cir. 1979), *modified on other grounds*, 615 F.2d 642 (1980); *United States v. Davis*, 589 F.2d 904, 906 (1978); *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976).[2] The totality of the circumstances prior to the mistrial must be analyzed in order to determine the existence of bad faith (i.e. gross negligence or intentional misconduct) on the part of the government. *United States v. Gaultney, supra; United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976).

The instant case first came to trial on September 8, 1980. AUSA Dorothy Kirkley was government counsel at that time. The trial, however, was postponed due to alleged grand jury abuse and the government reindicted the case by superseding indictment rather than face the issue.

The case again came to trial on Monday, November 3, 1980. AUSA William Sutton was government counsel at this time. The change of government counsel was due to caseload and administrative problems besetting AUSA Kirkley. (V. 3:5)

As a result of the substitution of government counsel in the case, AUSA Sutton was rushed to prepare for trial.

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[2] In *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit Court of Appeals adopted Fifth Circuit case law as precedent.

The manner in which the entire case was presented illustrates that AUSA Sutton did not have adequate time to get ready for trial.

The trial record bears out the problems of AUSA Sutton's unfamiliarity with AUSA Kirkley's representations relating to discovery and other matters. Defense counsel made a significant number of objections to AUSA Sutton's unfamiliarity with matters which defense counsel understood to have already been decided. (V. 7:58; V. 7:110, V. 7:131; V. 7:142; V. 8:342; V. 8:399; V. 8:525) It was even necessary for AUSA Sutton to call AUSA Kirkley to determine what her position was on certain matters because of his unfamiliarity with her decisions. (V. 8:461)

Additionally, during opening statement, AUSA Sutton incorrectly told the jurors that Count Two of the indictment charged the Defendants with possession of a quantity of cocaine with intent to distribute. (V. 7:75) Although the court gave a cautionary instruction and told the jury that the government attorney had made an incorrect statement, the misstatement is a further example of the prosecution's inadequate case preparation.

Furthermore, the court ordered the government to reorder its proof so that co-conspirator hearsay would not be heard by jurors prior to the court's determination of whether or not the statements would be admissible. Nevertheless, with the very next question, AUSA Sutton brought out objectionable co-conspirator hearsay and the Court determined that a *James* hearing would be necessary. (V. 7:186-7; 192)

Finally, the inadequate time for preparation was further exemplified by the manner in which the mistrial

occurred. Sheriff Moore, testified at trial that a DC-6 airplane had been seized and that Petitioner Robert Snowden, Jr. wanted the Sheriff to buy it back for him. This suggested to the jury that another airplane at another time had been seized in a drug operation and that Snowden was trying to get it back. AUSA Sutton pursued his questions concerning the DC-6 airplane. (V. 8:645-6)

Then, during the testimony of Case Agent John Landrum, he made a statement concerning a prior indictment and previous trial date. This reference to the first indictment indicated that there had been prior misconduct and that the prior indictment concerning the airplane that Snowden was allegedly attempting to purchase (and possibly the cocaine referred to in the prosecutor's opening statement).

In this case, a retrial of Petitioners should be barred because the U.S. Attorney's unfamiliarity of the case, and the case agent's prejudicial comments which were a result of lack of preparation and unfamiliarity of the case, rose to the level of gross negligence. The government should not have additional time and a second bite at the apple to get its case together and to prepare for trial. The government should not receive the benefit of additional time to prepare and strengthen its case since the Petitioners had no choice but to move for mistrial when the blatantly prejudicial statements came into evidence.

As the trial judge stated: "There was no excuse for the reference to a first indictment or a prior trial, either one." (V. 8:658) Case Agent Landrum should have known better than to give testimony concerning a prior indictment and prior trial date, especially in light of his many years of

training and courtroom experience. Nevertheless, even in this posture, it is apparent that the main case agent was inadequately prepared by AUSA Sutton when he took the stand. The case agent is an agent of the U.S. Attorney's Office and his actions and conduct are attributable to the government.

These incidents show that the U.S. Attorney who handled the case was virtually unfamiliar with it. The direct result was the government's gross negligence which compelled Petitioners to move for a mistrial in this case.

After granting the mistrial, the district court judge stated: "All right, maybe the government can get their act together a little better." (V. 8:658) It was apparent to the trial judge that the government *did not have its act together*. Certainly, the government should not be afforded another opportunity to convict the Petitioners since the mistrial arose out of the government's gross negligence and unpreparedness in the first instance. This is the very kind of situation which the Due Process and the Double Jeopardy Clause should seek to eliminate.

The Petitioners contend that the gross negligence alleged here, is no less than the gross negligence set out in *United States v. Kessler, supra*. Thus, retrial here should also be barred.

CONCLUSION

For all of the above reasons, Petitioners would request this Honorable Court to grant certiorari and reverse the Eleventh Circuit Court of Appeals opinion.

Respectfully submitted,

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By: /s/ MARK J. KADISH

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Petition For Writ of Certiorari to the Eleventh Circuit Court of Appeals filed by Petitioner has been served upon:

Solicitor General of the United States
Room 5614
Department of Justice
Washington, D.C. 20530

via first class mail, postage prepaid.

This the ____ day of November, 1982.

MARK J. KADISH